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February 28, 2011

BY OVERNIGHT MAIL AND ELECTRONIC MAIL

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Re: CERCLA Financial Responsibility Requirements for Hardrock Mines

Dear Mr. Berlow:

We are writing on behalf of the New Mexico Environment Department to express our comments and concerns on the initial efforts of the Environmental Protection Agency (EPA) to establish financial responsibility requirements for hardrock mining facilities under section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9608(b). We appreciate the opportunity to submit these comments and EPA's consideration of our comments.

Section 108(b)(1) of CERCLA requires EPA "to promulgate requirements . . . that classes of facilities establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with the production, transportation, treatment, storage, or disposal of hazardous substances." 42 U.S.C. § 9608(b)(1). It further requires EPA to "identify those classes for which requirements will be first developed and publish notice of such identification in the Federal Register." *Id.* The statute provides that "[p]riority in the development of such requirements shall be accorded to those classes of facilities, owners, and operators which [EPA] determines present the highest level of risk of injury." *Id.* Pursuant to this provision of CERCLA, on July 10, 2009, EPA identified for the development of financial responsibility requirements classes of facilities within the hardrock mining industry, including "those which

extract, beneficiate, or process metals (*e.g.*, copper, gold, iron, lead, magnesium, molybdenum, silver, uranium, and zinc) and non-metallic, non-fuel minerals (*e.g.*, asbestos, gypsum, phosphate rock, and sulfur)." 74 Fed. Reg. 37213 (June 28, 2009). EPA stated that it will conduct further evaluation of the hardrock mining industry leading to proposed financial responsibility requirements. *Id.* at 37219.

Significantly, section 114(d) of CERCLA provides that:

> [N]o owner or operator of a vessel or facility who establishes and maintains evidence of financial responsibility in accordance with this subchapter[1] shall be required under any State or local law, rule, or regulation to establish or maintain any other evidence of financial responsibility in connection with liability for the release of a hazardous substance from such vessel or facility.

42 U.S.C. § 9614(d). Under this provision, EPA promulgation of final regulations setting forth financial responsibility requirements for hardrock mining facilities could have the potential to preempt existing state laws and regulations that require financial responsibility for hardrock mining facilities. Recognizing this potential to preempt, perhaps inadvertently, effective and efficacious state financial responsibility requirements, EPA has informally requested comment on this issue from state agencies. This letter is written in response to that request. The Environment Department strongly urges EPA to propose and adopt final regulations that do not preempt successful state financial responsibility requirements for hardrock mining facilities, such as those in effect in New Mexico.

The Environment Department requires financial responsibility for hardrock mining facilities – among other types of facilities – pursuant to its authority under the New Mexico Water Quality Act. N.M. STAT. ANN. §§ 74-6-1 to 74-6-17. The Water Quality Act requires the New Mexico Water Quality Control Commission (Commission) to adopt various regulations to protect surface water and groundwater quality. Among other things, the Commission must "adopt water quality standards for surface and ground waters of the state." N.M. STAT. ANN. § 74-6-4(C). The Commission must also adopt regulations requiring persons to obtain from the Environment Department "a permit for the discharge of any water contaminant." N.M. STAT. ANN. § 74-6-5(A). The Act authorizes the Department to place conditions on the discharge permit to protect groundwater. Upon receiving a permit application, the Department may either grant the permit, grant the permit subject to conditions, or deny the permit. N.M. STAT. ANN. § 74-6-5(D). The Department must deny a discharge permit if the discharge would cause or contribute to contaminant levels in excess of water quality standards at any place of present or potential future use. N.M. STAT. ANN. § 74-6-5(E)(3). The Commission must also adopt procedures for providing notice to all interested persons and the opportunity for a public hearing. N.M. STAT. ANN. § 74-6-5(F). And the Commission must adopt regulations "for the operation and maintenance of the permitted facility, including requirements, as may be necessary or desirable, that relate to continuity of operation, personnel training and *financial responsibility*." N.M. STAT. ANN. § 74-6-5(G) (emphasis added).

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[1] The reference to "this subchapter" means subchapter I, chapter 103, title 42, which addresses hazardous substances releases, liability, and compensation, 42 U.S.C. §§ 9601 to 9628.

In accordance with the Water Quality Act, the Commission has adopted a body of implementing regulations. N.M. ADMIN. CODE tit. 20, ch. 6, pt. 2. (2006). Significantly, the express purpose of the regulations is "to protect all ground water of the state of New Mexico which has an existing concentration of 10,000 [milligrams per liter] or less [total dissolved solids], for present and potential future use as domestic and agricultural water supply." N.M. ADMIN. CODE § 20.6.2.3101.A. Included in the regulations are three categories of groundwater quality standards: 1) maximum numerical standards for thirty-three contaminants for protection of human health; 2) maximum numerical standards for nine contaminants and a range for pH for protection of domestic water supplies; and 3) maximum numerical standards for five contaminants for protection of water for irrigation use. N.M. ADMIN. CODE § 20.6.2.3103 The regulations also address discharge permits. N.M. ADMIN. CODE §§ 20.6.2.3101 to 3114. The regulations prohibit any person from causing or allowing a water contaminant "to discharge so that it may move directly or indirectly into ground water" unless that person is discharging pursuant to a discharge permit issued by the Environment Department. N.M. ADMIN. CODE § 20.6.2.3104. The regulations provide for notice to the public of proposed discharge permit, and the opportunity to request a public hearing on the proposed permit. N.M. ADMIN. CODE § 20.6.2.3108. The regulations further provide that a discharge permit may include a closure plan to protect ground water after the cessation of the operations causing the discharge. The closure plan is to include "a description of closure measures, maintenance and monitoring plans, post-closure maintenance and monitoring plans, *financial assurance*, and other measures necessary to prevent and/or abate such contamination." N.M. ADMIN. CODE § 20.6.2.3107.A(11) (emphasis added).

In addition, the New Mexico Energy, Minerals and Natural Resources Department requires financial responsibility for hardrock mining facilities pursuant to its authority under the New Mexico Mining Act. N.M. STAT. ANN. §§ 69-36-1 to 69-36-20. Among the purposes of the Mining Act is the "reclamation of lands affected by exploration, mining or the extraction of minerals." N.M. STAT. ANN. § 69-36-2. The Mining Act requires mine operators to obtain mining permits. N.M. STAT. ANN. § 69-36-7(a)(2). The permit must include a closeout plan, providing for reclamation of the mine facility to reestablish a self-sustaining ecosystem. N.M. STAT. ANN. § 69-36-7. Issuance of permits is subject to publication of notice to the public and a public hearing. N.M. STAT. ANN. § 69-36-8. Prior to issuance of a permit, the mine operator must establish financial assurance "to assure the completion of the performance requirements of the permit, including closure and reclamation, if the work had to be performed by the director or a third party contractor." N.M. STAT. ANN. § 69-36-7(Q). The financial assurance must be reviewed periodically "to account for any inflationary increases and anticipated changes in reclamation or closure costs." *Id.* The Energy, Minerals and Natural Resources Department implements these statutory requirements pursuant to regulations adopted by the New Mexico Mining Commission. N.M. ADMIN. CODE tit. 19, ch. 10. We understand that the Energy, Minerals and Natural Resources Department is writing to you separately on this matter, and we concur with their comments.

The Environment Department and the Energy, Minerals and Natural Resources Department work closely together in drafting and issuing permits for hardrock mining facilities to ensure that the financial assurance requirements – and other permit requirements – are consistent, integrated, and complimentary. The agencies allow the permitted mine operators to

submit one financial assurance instrument, or set of instruments, to meet the financial assurance requirements of both statutes. Through groundwater discharge permits issued under the Water Quality Act, and the mining permits issued under the Mining Act, the State agencies have jointly required permittees to establish financial assurance for all operating hardrock mines in New Mexico, as well as many that are no longer operating. Thus, for example, Chevron Mining Inc. has established financial assurance in the amount of $158,359,100 for the Questa Mine (formerly the Molycorp Mine),[2] an open pit and underground molybdenum mine in Taos County near Questa; Freeport-McMoRan Inc. has established financial assurance in the amount of $210,178,071 for the Tyrone Mine, an open-pit copper mine in Grant County near Silver City; Freeport McMoRan Chino Mines Company has established financial assurance in the amount of $185,178,505 for the Chino Mine, another open-pit copper mine in Grant County near Hurley; Freeport McMoRan Cobre Mining Company has established financial assurance in the amount of $27,572,273 for the Continental Mine, an open-pit copper, gold, silver, and molybdenum mine in Grant County near Hurley; LAC Minerals USA LLC has established financial assurance in the amount of $5,194,099 for the Cunningham Hill Mine, a gold leach mine in Santa Fe County near Cerrillos.

The Environment Department urges EPA to propose and adopt financial responsibility regulations for hardrock mining facilities that avoid federal preemption of these successful State of New Mexico programs. In developing these regulations, we encourage EPA to consider section 114(a) of CERCLA, which provides that "[n]othing in this chapter[3] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State." 42 U.S.C. § 9614(a). We also encourage EPA to be mindful that federal preemption of state law is not favored. Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981) ("Pre-emption of state law by federal statute or regulation is not favored in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.") (internal quotations omitted); *see also* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522 (1981) (same; "exercise of federal supremacy is not lightly to be presumed."); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) ("we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). With these principles in mind, we suggest several options – which are by no means mutually exclusive – that EPA can use to develop financial responsibility regulations that minimize any preemptive effect on state laws and regulations.

Under the first option, EPA would determine that the CERCLA financial responsibility regulations do not preempt state financial responsibility laws and regulations that are not designed primarily and specifically to address releases of hazardous substances into the environment. The purpose of financial responsibility requirements under CERCLA, of course, will be to address releases of hazardous substances into the environment. But many state

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[2] The Molycorp Mine was mentioned in EPA's Federal Register notice identifying hard rock mine facilities as categories of facilities to be subject to future financial assurance requirements under CERCLA. 74 Fed. Reg. 37213, 37216 (June 28, 2009).

[3] The reference to "this chapter" means chapter 103, title 42, or CERCLA, 42 U.S.C. §§ 9601 to 9675.

financial responsibility requirements have a broader or altogether different purpose. For example, the primary purpose of the financial assurance requirements of the New Mexico Mining Act is to ensure that the reclamation requirements of the Act are met. Reclamation under the Mining Act is an end in itself. The goal of reclamation under the Mining Act, moreover, is to establish a self-sustaining ecosystem. While another purpose of the financial assurance requirements is to protect surface water and groundwater from contaminants in mine wastes, the Mining Act requires reclamation whether or not reclamation is necessary to protect water resources. Given this distinction, federal preemption of state financial responsibility requirements could create huge gaps in the regulatory scheme. For example, a mine operator might fail to implement the reclamation requirements of its Mining Act permit, but that violation might not result in a significant release of hazardous substances into the environment. In such circumstances, the Energy, Minerals and Natural Resources Department might be prompted to call in the financial assurance to correct the violation, but EPA would not. If State law becomes preempted, the State agency will no longer have that ability.

The same problem could occur where a state regulates mine contaminants that are not hazardous substances. For example, under the Water Quality Act, the Environment Department regulates barium, fluoride, nitrate, and total dissolved solids, among other contaminants, that are not hazardous substances under CERCLA. *Compare* N.M. ADMIN. CODE § 20.6.2.3103 *with* 40 C.F.R. § 302.4, Table 302.4. Conditions at a hardrock mine resulting in the release of fluoride[4] into groundwater, for example, might prompt the Environment Department to call in financial assurance, but not EPA. If New Mexico law is preempted, again, the result would be an unnecessary gap in the regulatory scheme. Thus, by adopting this option, EPA would avoid unnecessarily interfering with myriad successful state laws and regulations.

Under the second option, EPA would further determine that the CERCLA regulations do not preempt state financial responsibility laws and regulations designed prospectively to prevent a release of hazardous substances from occurring, as distinct from addressing liability for a spill or accidental release of hazardous substances after it has occurred. Section 114(d) of CERCLA limits state and local laws and regulations requiring financial responsibility "in connection with *liability* for the release of a hazardous substance" (emphasis added). Many state financial responsibility laws and regulations are designed, directly or indirectly, to prevent or minimize the nonsudden release of hazardous substances, such as acid mine drainage, typical at hardrock mines; they do not address liability resulting from a spill or accidental release of hazardous substances. For example, the financial assurance requirements in most of the discharge permits issued by the Environment Department under the Water Quality Act cover the estimated costs of reclamation and treatment of contaminated mine water, but do not cover the costs of cleaning up a spill or accidental release of contaminants. At least one state court has recognized this distinction. *See* Chemclene Corp. v. Pa. Dep't of Natural Res., 497 A.2d 268, 271-72 (Pa. Commw. Ct. 1985) (forfeiture of a bond is predicated on the violation by a waste transporter of state Solid Waste Management Act, not on the release or spill of hazardous substances). We recognize that this option makes a distinction that may be difficult to apply in many

[4] Fluoride is a groundwater contaminant of particular concern at the Questa Mine. *See* EPA, Record of Decision, Molycorp, Inc., Questa, New Mexico (CERCLIS ID No: NMD002899094) at 2-209 to 2-265, 2-283 to 2-292 (Dec. 20, 2010).

circumstances, and we recognize that EPA may not be willing to limit the scope of the CERCLA regulations in this manner. Nevertheless, we believe this option would avoid preemption of most state financial responsibility laws and regulations and that it merits careful consideration.

Under the third option, EPA would set minimum financial responsibility criteria that each state program would be expected to meet, and if EPA found that a state program met those minimum criteria, the CERCLA regulations would not apply in that state. Thus, the CERCLA regulations would have no preemptive effect in states for which EPA has made such a finding. This option is similar in approach – though on a much smaller scale – to the authorization of state hazardous waste programs under section 3006(b) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6926(b). This option has several advantages. It would establish minimum federal financial responsibility criteria that would need to be met nationwide; it would create a clear delineation of those state financial responsibility requirements that are not preempted; and it would avoid preemption of those state financial responsibility requirements that are successful and effective.

As we mentioned, these options would not be mutually exclusive. EPA could adopt two or all three of the options.

We particularly urge EPA to adopt the third option, either alone or in combination with other options. We believe the third option best strikes the proper balance of federal-state authority towards our common goal of protecting public health and the environment.

Finally, EPA should expressly state its interpretation of section 114(a) and (d) of CERCLA, and its intention to limit the preemptive effect of the regulations. EPA should make these statements, and explain its reasoning, in its *Federal Register* notices – in the preamble to both the proposed regulations and, most importantly, the final regulations. EPA's reasonable interpretation of CERCLA is of course entitled to deference. Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 844-45 (1984). Further, EPA's stated intention to preempt – or not to preempt – state law is also entitled to deference. *See* Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 583 (1987) ("it is appropriate to expect an administrative regulation to declare any intention to pre-empt state law with some specificity").

Thank you for your consideration of our comments. If you have any questions on this matter, please do not hesitate to call either one of us at 505-827-2919 (Mr. Olson) or 505-827-2985 (Mr. de Saillan).

Sincerely,

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Charles de Saillan
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Cc: William Brancard, EMNRD
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